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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

T. J. HAYES — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTION PRESENTED

Whether petitioner was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by post-conviction relief procedures established by the Supreme Court of Arkansas.

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OPINIONS BELOW

This petition is grounded upon the denial by the Arkansas Supreme Court of petitioner's request, pursuant to Rule 37.2, Arkansas Rules of Criminal Procedure, Ark. Stat. Ann. Vol. 4A (Repl. 1977 and Supp. 1983). The Arkansas Supreme Court's opinion is reported as Hayes v. State, 280 Ark. 509, ___ S.W.2d ___ (1983). Petitioner's conviction for capital murder was affirmed in Hayes v. State, 278 Ark. 211, 645 S.W.2d 662 (1983).

JURISDICTION

The respondent concurs that this court has jurisdiction to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner has adequately set forth the constitutional and statutory provisions involved in this proceeding.

STATEMENT OF THE CASE

Although somewhat self-serving, petitioner's statement of the case is sufficient to advise this court of the proceedings below leading to this petition.

REASON FOR DENYING THE WRIT

THE ARKANSAS SUPREME COURT DID PROVIDE CONSTITUTIONALLY ADEQUATE POST CONVICTION REVIEW OF PETITIONER'S CLAIMS.

Petitioner contends that the Arkansas Supreme Court arbitrarily denied him postconviction review of his conviction and sentence and thus denied him due process under the Eighth and Fourteenth Amendments to the United States Constitution. He also implies that, because the death penalty was imposed in this case, this Court should mandate that the Arkansas Supreme Court waive its procedural rules and consider his constitutional claims, whether they have merit or not. He further urges that this Court extend its previous holdings to require that the Arkansas Supreme Court afford a different standard of postconviction review in capital cases--a standard that would mandate postconviction review across the board when the death penalty is imposed.

These contentions are based on the allegation that petitioner was flatly denied postconviction review by not being granted a hearing. He also concludes that the review afforded by the Arkansas Court was constitutionally inadequate, a legal conclusion clearly refuted by previous holdings of this Court. A hearing was not warranted by the record.

In response to his allegations, respondent will show that the Arkansas Supreme Court did afford petitioner the

postconviction review to which he is constitutionally entitled; that the procedural rules invoked to bar further consideration of his allegations were constitutionally applied; that those rules are waived by the court in cases in which constitutionally significant issues are raised; that the Arkansas Supreme Court are constitutionally adequate under such decisions of this Court as Wainwright v. Sykes, 433 U.S. 72 (1977); and that the application of Ark. R. Crim. Proc. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Supp. 1983) (hereinafter Rule 37) follows and fully comports with this Court's interpretation of due process requirements in postconviction relief.

The Arkansas postconviction provisions of Rule 37 allow a state prisoner to seek postconviction review in the court imposing sentence only if he has not previously appealed the conviction to the Arkansas Supreme Court. Rule 37.1. If, however, such an appeal has already been effected, the prisoner may not proceed in the trial court without prior permission of the Arkansas Supreme Court. Proceedings under this rule must be commenced within three (3) years of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void. Rule 37.2(a), (c), (Repl. 1977 & Supp. 1983).

As petitioner's conviction was affirmed on direct appeal by the Arkansas Surpeme Court in Hayes v. State, 278 Ark. 211, 645 S.W.2d 662 (1983), cert. denied, ___ U.S. ___

(Nov. 2, 1983), he was thus required to petition the Arkansas Supreme Court for permission to proceed in the trial court.

In his petition for permission to proceed under Rule 37 (Petitioner's appendix) several grounds are alleged some of which are reproduced as examples of his "proof" of a prima facie case being made for an entitlement to a hearing before the trial court and for the proposition the Arkansas Supreme Court failed to follow its own procedure:

Speedy Trial - In petitioner's first appeal, petitioner contended he had not been brought to trial in three terms of court. This argument was rejected in the first appeal. 274 Ark. at 447.

At his second trial, defense counsel again raised the issue of speedy trial pointing out to the trial court that Ark. R. Crim. P. 28.1, Ark. Stat. Ann. Vol. 4A (Repl. 1977, Supp. 1983), had been changed regarding the time for a defendant imprisoned on another charge to be brought to trial. (T. 97-105) The trial court denied petitioner's motion to dismiss for lack of speedy trial, a ruling affirmed in the second appeal. (T. 106) 278 Ark. 214. As indicated in the second appeal, the speedy trial issue was not considered because of this Court's decision adverse to petition on that issue in the first appeal. The issue was thus not cognizable since Rule 37 was not a proper vehicle through which to reargue issues raised on appeal. Neal v. State, 270 Ark. 442, 605 S.W.2d 421 (1980).

Voir Dire - Petitioner cited several alleged irregularities which he said occurred during the voir dire of the jury. The Arkansas Supreme Court has reaffirmed its rejection of the death-qualified jury issue and, in the same opinion, noted that whether to hold sequestered voir dire is discretionary. Rector v. State, 280 Ark. ___ (Slip Op. Oct. 17, 1983).

Petitioner's allegations as to what defense counsel could have done during voir dire amounted at most to conclusory allegations unsupported by resulting evidence of the manner of prejudice sustained. Perry v. State, 279 Ark. 213 (Adv. Sheets, May 9, 1983). Petitioner's allegations failed since he made no threshhold showing that any juror was unqualified, especially since they are presumed to be unbaised and qualified. Moss v. State, 280 Ark. 27 ___ S.W.2d ___ (1983).

Penalty Phase - Petitioner contends that defense counsel should have offered evidence in mitigation, that the verdict was against the law and that the death sentence imposed was not proportionate to the crime. These arguments were rejected in its Rule 37 opinion since the Arkansas Supreme Court clearly stated on appeal:

> We find no evidence that the jury's verdict was based on either passion or prejudice, nor do we find the imposition of the death penalty in this case to be arbitrary, capricious, or wanton. In our comparative review of death sentences, we find the sentence not excessive.

278 Ark. at 216.

This Court further found, upon its review of the entire record, that the aggravating circumstances outweighed beyond a reasonable doubt any mitigating circumstances. 278 Ark. at 216. Finally, petitioner waived the opportunity to offer mitigating evidence. Issues raised at trial, litigated on direct appeal and decided adversely to petitioner cannot form the basis for Rule 37 relief. Neal v. State, supra.

The Arkansas Supreme Court properly followed its own procedural guidelines in reviewing petitioner's claim.

Appellee notes there is no federal constitutional right to state appellate review of state criminal convictions. Estelle v. Dorrough, 420 U.S. 523, 537 (1975); Ross v. Moffitt,, 417 U.S. 600, 610-611 (1974). (The State is fully aware of the federal constitutional safeguards indeed once a state establishes an appeal process, however, Douglas v. California, 372 U.S. 353 (1963)).

The Arkansas Supreme Court did an exhuastive examination of the safeguards employed in the Arkansas statutes, court rules and case law in Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, reh. denied, 434 U.S. 977 (1977), after this Court ordered it to reconsider the imposition of the death penalty in Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), vacated in part, 429 U.S. 808, reh. denied, 429 U.S. 966 (1976).

The second decision in Collins specifically upheld the constitutionality of the statutory scheme imposing the death

penalty at the time petitioner was tried in light of this Court's decisions in Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 423 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Collins, 261 Ark. at 201.

It is obvious that the Arkansas provisions were not analyzed in light of Lockett v. Ohio, 438 U.S. 586 (1978), which was not decided until the following year. Petitioner's reliance on Lockett is not well-founded, however, as noted above.

The Arkansas Court also noted in Collins the specific additional safeguards in the Arkansas system when either the death penalty or life imprisonment is imposed. Ark. Stat. Ann. §43-2725 (Repl. 1977), provides that in such cases, the Arkansas Supreme Court "shall review all errors prejudicial to the rights of the appellant." This has been construed by the Arkansas Court to mean "that this mandated review required the examination of the trial record, even though the objectionable action which might be reversible error was not argued on in any way." Collins, 261 Ark. at 216.

Pursuant to a prior similar statute, the Arkansas Court has, in at least four cases, reversed convictions involving the imposition of the death penalty on issues raised neither at trial nor on appeal. Walton v. State, 232 Ark. 86, 334

S.W.2d 657 (1960); Alford v. State, 223 Ark. 330, 332, 266 S.W.2d 804 (1954); Smith v. State, 205 Ark. 1075, 172 S.W.2d 249 (1943); Webb v. State, 154 Ark. 67, 242 S.W. 380 (1922). See also Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342 (1979).

There are other cases in which the Arkansas Court has found that the death penalty could not be imposed and either reduced a death sentence to life imprisonment or a term of years or granted a new trial. Bagley v. State, 247 Ark. 113, 414 S.W.2d 567 (1969); Smith v. State, 205 Ark. 1075, 172 S.W.2d 248 (1943); Blake v. State, 186 Ark. 77, 52 S.W.2d 644 (1932); Webb v. State, 154 Ark. 67, 242 S.W. 380 (1922).

The Arkansas Court has also reduced punishment in capital cases from death to life imprisonment when there was error only in the sentencing procedure. Crowe v. State, 178 Ark. 1121, 13 S.W.2d 606 (1929); Webb v. State, 154 Ark. 67, 242 S.W. 380 (1922). Even more on point here, a failure to properly consider mitigating circumstances has also resulted in the court's reducing the punishment to life imprisonment. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894 (1977); Davis v. State, 155 Ark. 245, 244 S.W. 750 (1922).

There are numerous other cases in which the Arkansas Supreme Court has indicated that it will circumvent the contemporaneous objection rule to grant postconviction relief in a case of manifest injustice. In Scott v. State, 267 Ark.

536, 592 S.W.2d 122, 124 (1980), petitioner was denied relief on his second petition under Rule 37, which was filed more than three years after his commitment. Although the filing was clearly barred under Rule 37.2(b) as a subsequent petition and under Rule 37.2(c) as untimely, the court still implied that it would "go behind the rule" if petitioner had been able to "clearly demonstrate manifest injustice resulting from his several opportunities for redress." 592 S.W.2d at 124.

In Irons v. State, 267 Ark. 469, 591 S.W.2d 650 (1980), the court reversed the trial court's denial of Rule 37 relief on grounds not even raised on the appeal from the denial. Although there was a "mysterious abandonment" of virtually all grounds of the petition on appeal, the court found the one argument raised to be broader than the point stated," reviewed the record and found reversible error. 591 S.W.2d at 651.

In Hilliard v. State, 259 Ark. 81, 84, 531 S.W.2d 463 (1976), the court held that the defendant could raise the question of ineffective assistance of counsel on motion for postconviction relief even though he had not raised it at trial if he did not have adequate opportunity to raise the question to the trial court.

In Walker v. State, 251 Ark. 182, 471 S.W.2d 536 (1971), appeal after remand, 254 Ark. 1072, 497 S.W.2d 258 (1973),

the court reiterated its rule that postconviction relief is available to afford relief to a defendant who was insane at the time of his trial or sentence if the fact was not made known to the trial court, even if his allegation was "ineptly stated." 251 Ark. at 185. The court further held that the Arkansas provisions for postconvition relief were adopted "to avoid technical niceties in existing procedures." 251 Ark. at 186.

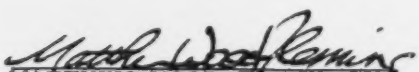
The Arkansas Supreme Court acted properly and within the bound of its own rules and case law and due process in denying petitioner's request to proceed.

CONCLUISON

The petition for writ of certiorari to the Supreme Court of Arkansas should be denied for the reasons and authorities cited herein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Matthew Wood Fleming, Assistant Attorney General, do hereby certify that I have served a copy of the foregoing Brief for Respondent in Opposition to Petition, by mailing a copy of same by U.S. Mail, postage prepaid, to Jeffrey M. Rosenzweig, Attorney for Petitioner, 710-300 Spring Building, Little Rock, Arkansas, 72201, this 26th day of January, 1984.

Matthew Wood Fleming
MATTHEW WOOD FLEMING
Assistant Attorney General

I, Steve Clark, am a member in good standing of the Bar of this Court. I hereby state, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, that, to my knowledge, the requisite number of copies of the attached Brief for Respondent in Oppostion to Petition were mailed on January 26, 1984 by placing them in the United States Mail, postage prepaid, and designated as first class mail. The pleading was due in this Court on

Steve Clark
STEVE CLARK
ATTORNEY GENERAL

STATE OF ARKANSAS

COUNTY OF PULASKI

Sworn to and subscribed before me this 26th day of January, 1984.

Marilyn G. Vaughan
NOTARY PUBLIC

My commission expires:
August 16, 1989

Case style:

T. J. Hayes Petitioner
v.
State of Arkansas Respondent